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In The
Supreme Court of the United States

HOWARD G. DAWKINS, JR., M.D.;
ANNETTE DAWKINS,
Petitioners,

v.

JAMES LEE WITT, Director
of the Federal Emergency Management Agency,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether actions by agents and representatives of the National Flood Insurance Program, including but not limited to: (a) telling the insureds that the NFIP does not enforce the 60-day proof of loss requirement in major disasters, such as hurricanes; (b) telling the insureds that claims for flood damage may be reopened by the NFIP if additional flood damage is discovered; (c) inspecting only the first floor of a three-story home, and refusing to inspect the second and third floors, following a hurricane; (d) continuing negotiations with the insureds and causing them to incur substantial time and money in submitting additional documentation to the NFIP and hiring structural engineers to inspect the insured premises; (e) accepting the first proof of loss after the 60-day period and paying on the loss, but not accepting a second claim for additionally discovered damage, constitute affirmative misconduct for the application of estoppel against the Government?

2. Whether through the misrepresentations of the NFIP agents and its acceptance of the first proof of loss after expiration of the 60-day deadline, the NFIP waived the 60-day proof of loss requirement?

3. Whether the requirements for filing a proof of loss in the Flood Policy are ambiguous and, therefore, should be construed in favor of Petitioners?

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HOWARD G. DAWKINS, JR., M.D.;
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JAMES LEE WITT, Director of the
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Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered February 3, 2003.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of North Carolina (App. 12) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1) is reported in 318 F.3d 606.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory Provisions

National Flood Insurance Act of 1968

42 U.S.C. § 4072 – Adjustment and payment of claims; judicial review; limitations; jurisdiction

> In the event the program is carried out as provided in section 1340 [42 U.S.C. § 4071], the Director shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance, and upon the disallowance by the Director of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Director, may institute an action against the Director on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

STATEMENT OF THE CASE

Petitioners, as Plaintiffs, brought the action against Respondent, Defendant James Lee Witt, Director of the Federal Emergency Management Agency, seeking to recover property damages sustained as a result of Hurricane Fran under the terms of a flood insurance policy ("Policy") issued to Petitioners pursuant to the provisions of the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001, et seq. Pursuant to the authority provided by 42 U.S.C. § 4072, Petitioners brought their suit in the United States District Court for the district in which the insured property was situated.

In 1989, Petitioners purchased a home located at 219 Beach Road North on Figure Eight Island in Wilmington, North Carolina (the "Insured Property"). Figure Eight Island is a private island with restricted access through a guarded gate. Access is limited to owners, their family, guests, and authorized construction and service personnel. At or about the same time of the purchase of the home, Petitioners also purchased flood insurance through the National Flood Insurance Program ("NFIP") for which they paid annual premiums. In addition, Petitioners purchased a homeowners' policy with Lloyd's of London, which provided coverage, among other things, for wind damage to the Insured Property.

On or about September 5, 1996, the Insured Property was severely damaged by Hurricane Fran. Immediately thereafter (on or about September 6, 1996), Dr. Dawkins contacted the office of Fickling & Clement Insurance ("Fickling & Clement"), the insurance agent through whom he purchased the NFIP Policy, so that Fickling & Clement could notify the NFIP and Lloyd's of London that the Insured Property had been damaged by the Hurricane. The office of Fickling & Clement in turn promptly notified the NFIP and Lloyd's of London.

On September 7, 1996, following the Hurricane, Figure Eight Island was opened to homeowners, but no motor vehicles were allowed due to the condition of the streets which were completely covered with sand. The only means of transportation was by foot or bicycle. Petitioners arrived as soon as they could that morning to examine the damage to the Insured Property. Upon arriving on the island, they at once observed the force of the Hurricane – the dunes in front of the beachfront cottages on the southern 90% of the island were completely destroyed; the sand in three lots in front of the Insured Property, including the dunes, was washed away; air conditioning units, beach walks, and landscape timbers from other homes were washed into Petitioners' backyard.

Dr. Dawkins realized that the first thing that he would have to do, after cleaning up all of the debris, would be to hire a contractor and an architect to assess the damage so that he could have an accurate idea as to the cause of the damage and the amount that the repairs and/or replacements would cost. He contacted Nick Garrett, a licensed contractor, to inquire whether he would assess the damage and handle the repairs to the Insured Property. In order to comply with the Homeowners Associations' Rules and Regulations for Figure Eight Island, Dr. Dawkins also contacted Michael Kerstin, an architect, to assist with this process.

On September 13, 1996, Dr. Dawkins had his first direct encounter with the NFIP. On this day, he met with an NFIP adjuster, Bob Hughes. During this meeting, Mr. Hughes would not acknowledge that the Hurricane was accompanied by waves and, surprisingly, he inspected only the first level and declined to inspect any other portion of the Insured Property. Subsequently, Mr. Hughes and Petitioners agreed upon the amounts to be claimed based upon damage due to flood that was readily ascertainable. It

was in this context that Dr. Dawkins first saw a proof of loss form. The proof of loss is only a one-page form, but it requires very detailed information including the full cost of repair or replacement to the building and/or contents that have been damaged. Mr. Hughes sent Petitioners an initial proof of loss, the net amount of which Petitioners did not feel was reasonable, so they did not execute it, but returned it to Mr. Hughes. Mr. Hughes then sent a second proof of loss with a net amount of $6,965.20, which Petitioners executed on December 12, 1996, and swore under oath that the amounts set forth therein were accurate. [App. 30]. This proof of loss was paid by the NFIP in January, 1997. [App. 34]. The proof of loss did not state that Petitioners were swearing under oath that this was the only damage that was done to the Insured Property or, that by signing it, they would be precluded from claiming any additionally discovered losses.

Based upon the manner in which this claim was handled, Petitioners reasonably understood that once they and the NFIP had agreed upon what would be covered in the proof of loss (that is, what the NFIP would pay), the proof of loss would be prepared by the NFIP, and Petitioners then would execute it. At no time did Mr. Hughes tell Petitioners that a proof of loss could be made in any other manner than the form document, and at no time did he ever raise the issue of the timeliness of the December proof of loss. To the contrary, Mr. Hughes told Dr. Dawkins that he only could claim items as losses that had been verified on the proof of loss form. In addition, he said that in major disasters, the 60-day time period was of no concern to the NFIP and that if more damage was discovered which was verifiable as flood damage, the NFIP would reopen the claim. Hurricane Fran indisputably was a major disaster, and Mr. Hughes' comments made perfectly good sense to Petitioners.

Meanwhile, Dr. Dawkins still was attempting to secure the services of Mr. Garrett to repair the Insured Property. This was no easy task, as the damage suffered to the homes on Figure Eight Island, as well as along the entire North Carolina coast, was massive. Mr. Garrett was not the original builder of the Insured Property, and he felt obligated first to repair the houses that he had built on the island. Petitioners also were under other restraints in getting Mr. Garrett to begin to assess the damage and work on their home, as the restrictive covenants for Figure Eight Island required that the Homeowners Association, through its Architectural Review Committee, provide prior approval for any repairs, construction, and even painting. Petitioners did not receive the necessary approval for repairs until December 2, 1996, and shortly thereafter, Mr. Garrett began working on the Insured Property. The house was under repair from December, 1996 until September, 1997.

In addition to Mr. Hughes, the NFIP adjuster, Lloyd's of London also sent an adjuster, C.P. Warren (who also happened to be a certified flood adjuster), to inspect the Insured Property. Unlike Mr. Hughes, Mr. Warren spent a substantial amount of time inspecting the Insured Property and, in July, 1997, Mr. Warren determined that the majority of the damage to the Insured Property was caused by flood. [App. 36]. This was the very first indication Petitioners ever had of any additional damage to the Insured Property because of flood. When Dr. Dawkins received Mr. Warren's evaluation, which included a list of damage above the first level of the home, the office of Fickling & Clement immediately sent it to the NFIP. [App. 42]. Approximately one month later, Petitioners received a response from the NFIP, in which it refused to reopen their claim on the basis that the Policy, pursuant to Article 6, did not provide coverage for items on the lower level or items located outside the perimeter of the building. [App. 44]. The NFIP did not raise the issue of a proof of loss in this letter. Upon

receipt of the response, both Petitioners and Fickling & Clement realized that the NFIP had not read the contents of their claim, which was made for damage to the second and third levels, not the first level, of the Insured Property.

The office of Fickling & Clement made numerous telephone calls to the NFIP from September, 1996 well into 1998, many of which were requests that the NFIP send someone else to inspect the Insured Property. During these numerous telephone calls, the parties at times spoke at length; however, the NFIP did not send an adjuster to inspect the Insured Property. At no time did anyone raise the issue of a 60-day time period being a bar to the Petitioners' claim. Based upon Mr. Hughes' representations to Dr. Dawkins that the claim could be reopened if any additional flood damage was discovered, Dr. Dawkins believed that there would be no problem with reopening the claim when the additional flood damage first was discovered in July, 1997.

The negotiations between the NFIP and Fickling & Clement continued for months after July, 1997. On October 8, 1997, Sherry Edwards of Fickling & Clement spoke to Freda Copeland, a "direct" representative of the NFIP, to discuss the claim. Ms. Copeland asked that Petitioners submit a statement from the contractor detailing the damages, an itemized bill for window replacement, and photographs both prior to and after the Hurricane. In compliance with this request, Petitioners and Fickling & Clement compiled the voluminous requested information and sent it to the NFIP on December 4, 1997. At no time during Ms. Edwards' conversation did Ms. Copeland raise any issue regarding the proof of loss.

On December 19, 1997, Petitioners received yet another letter denying coverage for items on the lower enclosed level of the house, damage that Petitioners had

never claimed. In response, Fickling & Clement, on January 8, 1998, sent another letter to the NFIP, again explaining that the claim was for damage above the lower enclosed level and that no damage on the lower enclosed level was part of Petitioners' claim. [App. 46]. On January 20, 1998, Frances Norman, another "direct" representative of the NFIP, called Ms. Edwards, and Ms. Edwards explained to Ms. Norman the nature of the damage that was being claimed. During this conversation, Ms. Norman indicated that the NFIP needed proof that the damage claimed was caused by flood, and requested that Petitioners hire a structural engineer, at their expense, to inspect the damage and prepare a report as to the cause and extent of the damage. Ms. Edwards requested that Ms. Norman send a letter directly to Petitioners, specifically identifying the information that the NFIP needed to process their claim.

On or about January 21, 1998, the NFIP sent Petitioners a letter advising them that if they "wish[ed] to pursue their claim," they should secure the services of a structural engineer, at their own expense, to examine the Insured Property and to submit a report stating "how the action of the flood waters caused the damage and exactly when this occurred." [App. 49]. In this letter, the NFIP indicated that it did not believe that flood was the cause of the damage to the Insured Property. However, the NFIP did not raise the issue of a 60-day time period to file a proof of loss.

In compliance with this letter, Dr. Dawkins hired Thomas W. Harwell, a structural engineer. In addition, Mr. Harwell also is a former naval officer with expertise regarding storms and waves. Mr. Harwell drove to Figure Eight Island with Dr. Dawkins on or about March 3, 1998, and inspected the Insured Property and the Island. In September, 1996, immediately after Hurricane Fran, Mr. Harwell had inspected property damage on the neighboring

North Topsail Island. Mr. Harwell concluded that the second and third levels of the Insured Property had been damaged by the flood, as the home had been twisted by the water surge during the Hurricane. This twisting substantially damaged the structure of the second and third levels. According to Mr. Harwell, it is not at all unusual for this type of damage to take weeks or even months to manifest itself. On April 8, 1998, Mr. Harwell prepared a report setting forth his conclusions [App. 51], and Fickling & Clement forwarded it to the NFIP on April 21, 1998.

In May, 1998, Marlin Barnett, the Senior General Adjuster, NFIP Bureau and Statistical Agent, and another "direct" representative of the NFIP, met with Dr. Dawkins, Kurt Fickling of Fickling & Clement, Mr. Harwell, and Mr. Warren at the Insured Property to discuss and potentially resolve Petitioners' claim. Prior to this meeting, Dr. Dawkins had provided the NFIP with detailed information, including correspondence with Lloyd's of London, and the detailed construction estimates and expenses which the NFIP had requested. It soon became apparent to everyone present at the meeting, however, that Mr. Barnett had not reviewed any of the written information that had been prepared and provided to the NFIP at its request. Even more disturbing at that time was Mr. Barnett's behavior - he was very rude to everyone present, and displayed an attitude of disdain in response to the information that was being presented to him at the meeting.

Subsequently, on May 20, 1998, Mr. Barnett requested additional information from Fickling & Clement regarding Petitioners' claim. As with the prior requests, this information immediately was sent to the NFIP. [App. 53]. On June 18, 1998, however, Petitioners received yet another and final denial letter from the NFIP, this time stating that the NFIP's right to investigate had been impaired because the property had been repaired and, thus,

it would not entertain any additional payments on the claim. Incredibly, the NFIP took this position in spite of the fact that Petitioners repeatedly had requested that the NFIP send an inspector to the Insured Property, to no avail. The NFIP further notified Petitioners that they had until August 26, 1998 to file a lawsuit against the agency. No issue about the proof of loss ever was raised.

On August 24, 1998, Petitioners brought suit against Respondent, seeking damages for the property damage to the Insured Property caused by flood. In Respondent's Answer to the Complaint, filed almost 1 ½ years after Petitioners first discovered additional flood damage and began dealing with the NFIP on a regular basis regarding their claim, Respondent first raised the issue that Petitioners had not timely filed a proof of loss. Although Petitioners argued that they did not discover the flood damage until July, 1997 (10 months after Hurricane Fran), and thus could not comply with the 60-day time period established by the Policy and that the NFIP should be precluded from raising the issue of the proof of loss requirement based on the principles of estoppel and waiver, the United States District Court for the Eastern District of North Carolina granted Respondent's Motion for Summary Judgment [App. 12], which was affirmed on appeal by the Fourth Circuit. [App. 1].

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE AN EXAMPLE OF THE TYPE OF GOVERNMENTAL AFFIRMATIVE MISCONDUCT TO WHICH ESTOPPEL MAY APPLY.

1. Estoppel

In light of the undisputed facts in this case, Respondent should be estopped from raising the defense of Petitioners' failure to file a proof of loss for the additional flood damage discovered to the Insured Property. This Court has stated that "[e]stoppel is an equitable doctrine invoked to avoid injustice in particular cases." Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 59, 104 S. Ct. 2218, 2222, 81 L. Ed. 2d 42, 51 (1984). Petitioners acknowledge the well-established rule of law, however, that "the Government may not be estopped on the same terms as any other litigant" and that when the government is involved, a party claiming estoppel bears a heavier burden. Notably, this Court in Heckler expressly declined, upon the government's request, to go even further to establish a flat rule of law that "estoppel may not in any circumstances run against the Government." Id. at 60, 104 S. Ct. at 2224, 81 L. Ed 2d at 52. There, this Court stated:

> Though the arguments the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Id. at 60-61, 104 S. Ct. at 2224, 81 L. Ed 2d at 52 (emphasis in original). This is precisely the case presented to this Court. See, e.g., Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982); Dempsey v. Director, 549 F. Supp. 1334 (E.D. Ark. 1982) (both courts holding that the conduct of the Federal Emergency Management Agency and its agents was sufficient to estop the Government from asserting the untimely filing of a proof of loss as a defense).

According to this Court in Heckler, supra, a party asserting estoppel against the government must in the first instance demonstrate that the traditional elements of estoppel are present. The traditional elements of estoppel are as follows: (1) the party to be estopped knew the true facts; (2) the party to be estopped intended for his conduct to be acted upon or acted in such a way that the party asserting estoppel had a right to believe that it was intended; (3) the party claiming estoppel was ignorant of the true facts; and (4) the misconduct was relied upon to the detriment of the parties seeking estoppel. McCrary v. Fed. Emergency Management Agency, 642 F. Supp. 544, 547 (E.D.N.C. 1986).

All of the elements of estoppel are present in the instant case. As to the first element, it is indisputable that the NFIP knew the true facts - that is, that a proof of loss was strictly required to be filed within 60 days after the date of loss. Secondly, Petitioners have established that through its course of conduct with Petitioners and their contractor, insurance agent, and structural engineer, the NFIP, through its agents, intended for its conduct to be acted upon or acted in such a way that Petitioners had a right to believe that it was intended to be acted upon. In this regard, the evidence reveals that Mr. Hughes, NFIP's agent, made several gross misrepresentations, including telling Dr. Dawkins that in major disasters, the 60-day time period was of no concern to the NFIP, and, telling Dr. Dawkins that as additional flood

damage was discovered, the claim could be reopened. In addition, the NFIP accepted Petitioners' December, 1996 proof of loss, which was untimely under the terms of the Policy. Also, "direct" representatives of the NFIP, not just the NFIP's independent adjuster, engaged in protracted negotiations with Petitioners regarding the additional flood damage discovered to the Insured Property, causing Petitioners to spend substantial and additional time, effort, and money. At the NFIP's request, and long after the 60-day deadline, Dr. Dawkins retained a structural engineer to inspect the Insured Property and prepare a report for submission to the NFIP.

Thirdly, there is plenary evidence in the record that Petitioners were ignorant of the true facts. Petitioners were never told, either orally or in writing, that they could obtain a proof of loss form directly from the NFIP upon request. Instead, the letter from the NFIP only stated that "[y]our adjuster can provide this form to you and help you complete it." This, along with the fact that a form had been provided by the NFIP adjuster in December, reasonably led Petitioners to believe that this was the manner in which such a form was received.

Petitioners acknowledge that they had a copy of the Flood Policy and that they may be charged with legal notice of the Code of Federal Regulations. Knowledge of these items, however, still did not inform Petitioners of the alleged "true facts" - that failure to file a proof of loss within 60 days after the date of loss would result in a denial of their claim. It should be noted that immediately after the Policy details the requirements for filing a proof of loss, it states that this requirement can be waived. In Section J.7. of Article 9, the NFIP states that:

> We may, at our option, waive the requirement for the completion and filing of a proof of loss in certain cases, in which you will be required to sign and, at our option, swear to an adjuster's report of the loss and the damages sustained, which is needed by us in order to adjust your claim.

[App. 27]. In light of this express provision, and the manner in which the NFIP had handled Petitioners' December proof of loss, including the representations that the NFIP's adjuster made to Dr. Dawkins - that if additional flood damage was found, the NFIP would reopen the claim - it cannot be said as a matter of law that Petitioners were not ignorant of the "true facts." To the contrary, the evidence viewed in the light most favorable to Petitioners fully supports their contention.

Finally, as to the fourth element of estoppel, there is no doubt that Petitioners have relied upon Respondent's actions and misrepresentations to their detriment. Accordingly, they have met their burden of proving all of the elements of traditional estoppel.

This Court has held that the private litigant also must show that the government agent who allegedly made the misrepresentation had the authority to make such a misrepresentation, and must show affirmative misconduct by the government official. Office of Personnel Management v. Richmond, 496 U.S. 414, 421, 110 S. Ct. 2465, 2470, 110 L. Ed. 2d 387, 397 (1990); Humphrey v. Nat'l Flood Ins. Program, 885 F. Supp. 133, 137 (D. Md. 1995). Because the Fourth Circuit erroneously held that the allegations and facts of this case demonstrate that Respondent did not engage in any affirmative misconduct, its decision should be reversed.

Several cases are instructive on this issue. For example, in Montana v. Kennedy, 366 U.S. 308, 81 S. Ct. 1336, 6 L. Ed. 2d 313 (1961), the petitioner brought a declaratory judgment action seeking to establish American citizenship. The petitioner claimed that a consular official gave his mother erroneous advice that she could not return to the United States while pregnant. Because of that advice, the petitioner was not born in the United States and, thus, was deprived of United States citizenship. This Court determined that "what may have been only the consular official's well-meant advice - 'I am sorry, Mrs., you cannot [return to the United States] in that condition' - falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth." Id. at 314-15, 81 S. Ct. at 1340-41, 6 L. Ed. 2d at 317.

In another case, Schweiker v. Hansen, 450 U.S. 785, 101 S. Ct. 1468, 67 L. Ed. 2d 685 (1981), the petitioner, the Department of Health and Human Services, sought review of a judgment that estopped it from denying the respondent "mother's insurance benefits" under the Social Security Act. A field representative of the Social Security Administration met with the respondent and, during a 15-minute conversation, told the respondent that she was ineligible for such benefits and disregarded provisions of the Department's Claims Manual by failing to recommend that she file a written application. The respondent eventually filed a written application after learning 11 months later that in fact she was eligible. Pursuant to the Act, she also received retroactive benefits for the 12 months preceding her application, which was the maximum retroactive benefits allowed by the Act. The respondent contended, however, that she should receive retroactive benefits for the 12 months preceding her interview with the field representative. The United States Supreme Court held that the conduct of the field representative did not rise to the level of "affirmative misconduct." "But at worst, [his]

conduct did not cause respondent to take action . . . or fail to take action . . . that respondent could not correct at any time." Id. at 789, 101 S. Ct. at 1471, 67 L. Ed. 2d at 690 (citations omitted). Thus, because the field representative's errors "[fell] far short of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation," this Court declined to apply equitable estoppel against the Government.

Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982), is an example of a situation where the court found enough evidence on which to apply estoppel against the Government. In Meister Bros., the plaintiff's property was damaged by flood on July 8, 1978. The General Adjustment Bureau investigated and assessed the loss for the NFIP. From July to September, and thereafter until December 22, 1978, the adjuster made several visits to the site to investigate the loss, to arrange a salvage sale, and to negotiate the amount of the loss to be submitted for reimbursement. At no time during this period did the adjuster ever tender to the plaintiff a proof of loss form to indicate that anything other than the Notice of Loss had to be filed by the plaintiff within the 60 days. On December 22, 1978, over three months after the deadline for filing, the adjuster prepared and submitted to the plaintiff a proof of loss form. The plaintiff subsequently was reimbursed $50,000 for damage to the contents of the building, and an additional sum of approximately $2000 from the salvage sale. The adjuster, however, continued to investigate and negotiate with the plaintiff for the remaining costs of damage to the building and debris removal. No settlement was reached, so the plaintiff filed suit. For the first time, the defendant argued that the plaintiff failed to file a sworn proof of loss within 60 days from the alleged loss, as required by the insurance contract. The Seventh Circuit reversed the entry of summary judgment on behalf of the

defendant agency and stated "on the quite unique facts of this case . . . a government agency will not be permitted belatedly to assert a technical defense to a law suit which admittedly, if it had been in a state court against a private insurance carrier, would not have prevailed. . . . The actions of paying a part of the claim under a policy which the insurer had treated as being fully applicable to the entire claim, over many months of time, does not permit a withdrawal thereafter from the position clearly and unambiguously taken." Id. at 1177.

The instant case provides a proper basis of applying estoppel against Respondent due to the improper conduct by the NFIP and its "direct" representatives and adjuster:

- Mr. Hughes, the adjuster for the NFIP, failed to inspect any part of the Insured Property, other than the first floor.

- Mr. Hughes made several gross misstatements to Dr. Dawkins regarding the proof of loss requirement and the process for reopening a claim, including telling Dr. Dawkins that in major disasters, the 60-day time period was of no concern to the NFIP, and that as additional flood damage was discovered, the claim could be reopened.

- Mr. Hughes was clothed with authority of the NFIP to investigate, negotiate, and aid in the processing of claims.

- Respondent accepted Petitioners' initial proof of loss well after the 60-day deadline and paid this initial claim.

- Respondent continued to address Petitioners' claims after the 60-day deadline.

- At the specific request of "direct" representatives of the NFIP, Petitioners spent substantial time and incurred additional expenses in providing the NFIP with the information requested to process their claim. Petitioners spent time and money in preparing and copying substantial documentation, retaining a structural engineer to examine the insured property and to prepare a report on the cause and the extent of the damage, and attending meetings.

- In May 1998, the NFIP sent its adjuster to inspect the Insured Property, but then he made no good faith effort to evaluate the claim. (Mr. Fickling, an insurance industry veteran of 28 years and someone who has qualified at trials as an expert in such matters, testified by Affidavit that this is "one of the most disturbing cases of bad faith adjusting" that he has ever seen.) [App. 60]

As all of this evidence demonstrates, Respondent engaged in serious affirmative misconduct during its handling of Petitioners' claims. Unlike the respondent in Schweiker v. Hansen, supra, the affirmative misconduct by Respondent in the instant case caused Petitioners to fail to take action that Petitioners could not correct at any time – that is, they failed to timely submit a proof of loss form and failed to require Mr. Hughes thoroughly to inspect the Insured Property. As noted by the Seventh Circuit in Meister Bros, Inc., supra, "[a]lthough it is axiomatic that 'men must turn square corners when they deal with the Government,' the

'public has an interest in seeing its government deal carefully, honestly and fairly with its citizens.'" Id. at 1177 (quoting Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143, 41 S. Ct. 55, 56, 65 L. Ed. 2d 188 (1920), and United States v. Wharton, 514 F.2d 406, 412-13 (9th Cir. 1975)). The Government here did not deal "carefully, honestly and fairly" when it dealt with Petitioners, and the import of the Fourth Circuit's decision is that the Government does not have to.

For all of the reasons stated above, this Court should grant Petitioners' Petition for Certiorari.

2. Waiver

By its conduct the Government also waived the 60-day proof of loss requirement. A waiver occurs when a party voluntarily and intentionally relinquishes a known claim or right. United States v. Slaughter, 366 F.2d 833, 840 (4th Cir. 1966). Section J.7. of Article 9 of the Flood Policy states in pertinent part:

> We may, at our option, waive the requirement for the completion and filing of a proof of loss in certain cases, in which event you will be required to sign and, at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages sustained, which is needed by us in order to adjust your claim.

[App. 27].

The inclusion of a subsequent more specific provision dealing with waiver in regard to the proof of loss requirement indicates that the NFIP may waive this requirement without going to the trouble of getting written

approval from the Federal Insurance Administrator in this limited situation. Mr. Hughes specifically told Dr. Dawkins that the 60-day time period was of no concern to the NFIP during a major disaster and that if additional flood damage was discovered, the claim could be reopened at a later date. Also, the NFIP accepted the first proof of loss claiming the flood damage known at that time, after the 60-day period. Applying the commonly used definition of waiver, Mr. Hughes in fact did waive the requirement of filing a proof of loss. If, as the NFIP suggests, the doctrine of waiver can never be raised, regardless of the facts and circumstances of a particular case, this will lead to results that are unfair and in some cases absurd. If it is the law, an NFIP "direct" agent, "direct" representative, or "independent adjuster" can make oral and written misrepresentations concerning the necessity of filing a proof of loss, thereby luring a policyholder to rely on the misrepresentations, and once a policyholder has done so, the NFIP will be able to deny his or her claim.

This is inherently contrary to the congressional purpose for establishing the National Flood Insurance Program, which has been articulated as being:

> [T]o alleviate the personal hardship and economic distress created by flood damage by making flood insurance coverage available on "reasonable terms and conditions" to those persons needing such protection which private insurers alone could not economically make available.

Dempsey v. Director, 549 F. Supp. 1334, 1340 (E.D. Ark. 1982) (citing 42 U.S.C. § 4001(a), (b)) (emphasis added).

This position also seems contrary to commonly held notions of the American public that they do not need to be as suspicious of the government when dealing with it on a claim as compared with dealing with a private insurance adjuster. It is completely normal and understandable for an insured, when dealing with the Federal Government, to assume that he or she will be treated fairly and not be misled. If, as in this case, an adjuster for the Government says that the 60-day requirement for filing a proof of loss will not apply in major disasters, the insured should be able to rely on such statement. If these misrepresentations were made by an adjuster for an insurance carrier, they would constitute bad faith and give rise to a claim for unfair and deceptive trade practices and punitive damages in many states.

The courts should not draw a line in the sand regarding the issue of waiver as it applies to the Government. Instead, each case needs to be evaluated in light of the facts and circumstances of that particular case. Because of the undisputed facts and circumstances in this case, this Court should grant Petitioner's Petition for Certiorari to hold that the 60-day proof of loss requirement has been waived.

B. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE REQUIREMENTS FOR FILING A PROOF OF LOSS ARE AMBIGUOUS AND SHOULD BE CONSTRUED IN FAVOR OF PETITIONERS; THEREFORE, THE DECISION BY THE FOURTH CIRCUIT SHOULD BE REVERSED.

Federal common law controls the interpretation of insurance policies issued pursuant to the NFIP. Chesapeake Ship Propeller Co. v. Stickney, 820 F. Supp. 995, 997 (E.D. Va. 1993). Nonetheless, courts applying federal common law to flood insurance policies have recognized that

"Congress did not intend to abrogate standard insurance law principles" by enacting the NFIP. Id. at 997 (citations omitted). Along those same lines, the Fourth Circuit in Riverside Bldg. Supply, Inc. v. Fed. Emergency Management Agency, 723 F.2d 1159, 1161 (4th Cir. 1983), stated the well-established rule of law that an ambiguity in an insurance policy should be interpreted in the insured's favor. Because there are several conflicting and confusing terms in the Flood Policy at issue here, it should be construed in favor of Petitioners.

For instance, under Section J of Article 9, entitled "Requirements in Case of Loss," the Policy states that an insured must: "(1) Notify us in writing as soon as practicable; (2) As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that we may examine it; and (3) Within 60 days after the loss send us a proof of loss." [App. 25]. In the letter from the NFIP to Petitioners, the NFIP "asks" that Petitioners "submit [their] claim as soon as possible" and then goes on to say that the Policy requires them to submit a proof of loss within 60 days of the date of loss. [App. 25]. A reasonable policyholder is left with the following question after reading this language – "If it is not possible to submit the proof of loss within 60 days, then is it okay to submit it as soon as possible?" The Policy continues that at its option, the NFIP can waive this requirement and require the insured to swear to an adjuster's report of the loss and the damages sustained. [App. 27]. Interestingly enough, the Policy does not plainly state that the failure to file a proof of loss will result in the denial of a claim. Thus, it is apparent that the Policy is not clear on the issue of the filing of a proof of loss. Given this ambiguity and the conduct and representations of the NFIP in handling Petitioners' claim, Petitioners should be allowed to pursue their claim.

CONCLUSION

This Court should grant the Petition for three reasons: (1) the misrepresentations and affirmative misconduct by the agents of the NFIP provide an opportunity for this Court to apply the doctrine of estoppel against the Government; (2) through the misrepresentations of the NFIP agents and its acceptance of the first proof of loss after expiration of the 60-day deadline, the NFIP waived the 60-day proof of loss requirement; and (3) the requirements for filing a proof of loss in the Flood Policy are ambiguous and, therefore, should be construed in favor of Petitioners.

Respectfully submitted:

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOWARD G. DAWKINS, JR., M.D.;
ANNETTE DAWKINS,
Plaintiffs-Appellants,

v. No. 99-1422

JAMES LEE WITT, Director of the
Federal Emergency Management Agency,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville.
James C. Fox, Senior District Judge.
(CA-98-124-F3-4)

Argued: March 1, 2000
Decided: February 3, 2003
[Entered: February 3, 2003]

Before WILKINSON, Chief Judge,
and WIDENER and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Chief Judge Wilkinson and Judge Traxler concurred.

COUNSEL

ARGUED: Albert Charles Ellis, WARD & SMITH, P.A., Winterville, North Carolina, for Appellants. Jerri Ulrica Dunston, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Teresa DeLoatch Bryant, WARD & SMITH, P.A., Winterville, North Carolina, for Appellants. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION

WIDENER, Circuit Judge:

Plaintiffs, Howard G. Dawkins, Jr., and Annette Dawkins, appeal the district court's order granting summary judgment in favor of defendant James Lee Witt, the director of the Federal Emergency Management Agency (FEMA). *Dawkins v. Witt*, No. 4:98-CV-124-F3 (E.D.N.C. Feb. 26, 1999). The plaintiffs own property insured under the National Flood Insurance Program that was damaged by Hurricane Fran. The plaintiffs contested FEMA's refusal to reopen their claim after FEMA made an initial payment for flood damage to the property. The district court granted the defendant summary judgment after determining that the plaintiffs could not recover. Because they failed to file a proof of loss within 60 days of the occurrence of the damage, as required by their insurance policy, we affirm.

I.

Because this case is before us on a motion for summary judgment, we view the facts in the light most favorable to the non-moving party, the plaintiffs. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994). Plaintiffs own a two-story home elevated above ground by posts on Figure Eight Island near Wilmington, North Carolina. On September 5, 1996, the plaintiffs' insured property was damaged as a result of Hurricane Fran. At the time of the hurricane, the plaintiffs' property was insured against flood damage through the National Flood Insurance program with a policy they had purchased through a local agent, Fickling and Clement Insurance Company (Fickling and Clement). FEMA oversees and implements the National Flood Insurance Program. See *West Augusta Dev. Corp. v. Giuffrida*, 717 F.2d 139, 140 n.1 (4th Cir. 1983) (quoting *Meister Bros., Inc. v. Macy*, 674 F.2d 1174, 1175 n.1 (7th Cir. 1982)). The plaintiffs' policy contained several clauses relevant in this

appeal.[1] First, Article 9, Paragraph J(3) of the policy required that the plaintiffs file a proof of loss for any claim within 60 days of the flood damage or loss.[2] A proof of loss is a document that provides FEMA with a statement of the amount of the claim and specific details concerning the loss, its cause, and ownership of the damaged property. FEMA has the option to waive the 60 day requirement under Article 9, Paragraph J(7), and if it does, the claimant must sign an adjuster's report.[3] The policy, pursuant to the federal regulations governing the National Flood Insurance Program, also contained a provision in Article 9, Paragraph D stating that none of the provisions of the policy could be waived absent express written consent by the Federal Insurance Administrator.[4] See 44 C.F.R. § 61.13(d). The plaintiffs had also insured their property against wind damage with a policy issued by Lloyds of London.

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1 FEMA advises that the policy issued to the plaintiffs was that which was in effect at the time of purchase in 1995. See 44 C.F.R., Pt. 61, App. A(1) (Oct. 1995). The standard flood insurance policy that is presently in effect pursuant to the current C.F.R. contains terms that may have been changed, but none of which are material here.

2 "Should a flood loss occur to your insured property, you must: ... [w]ithin 60 days after the loss, send us a proof of loss, which is your statement as to the amount you are claiming under the policy signed and sworn to by you . . . ."

3 "We may, at our option, waive the requirement for the completion and filing of a proof of loss in certain cases, in which event you will be required to sign, and, at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages sustained, which is needed by us in order to adjust your claim."

4 "This policy cannot be amended nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy can constitute a waiver of any of our rights."

The plaintiffs contacted Fickling and Clement on September 6, 1996 to inform them of the damage from the hurricane. Fickling and Clement then notified FEMA, who responded with a letter on September 10, 1996 indicating that it had received the notice of claim and had assigned it to Bellmon Adjusters, Inc. The letter also advised the plaintiffs that "[y]our policy requires you to submit a proof of loss to the Flood Center within sixty (60) days of the loss."

An adjuster from Bellmon Adjusters, Bob Hughes, met with the plaintiffs on their property on September 13, 1996. The parties do not dispute that at that time, Hughes would not acknowledge that the hurricane was accompanied by waves and, therefore, only inspected the first level of the home for damage. While Hughes informed the plaintiffs that they could only make claims for losses that were verified by a proof of loss, he also told them that with major disasters, FEMA was not concerned with the 60 day deadline required by the policy and that it would reopen the claim if the plaintiffs found any further verifiable flood damage after that time.

Hughes sent an initial proof of loss to the plaintiffs, which they rejected because they did not believe it was reasonable. Hughes then sent a second proof of loss to the plaintiffs, which they signed and returned to FEMA in December 1996. The 60 day period for filing a proof of loss had expired November 4, 1996. The plaintiffs acknowledged that they sent in the proof of loss well past the 60 day deadline required by their policy. Despite the late filing, FEMA paid the claim amount indicated on the second proof of loss of $6965.28 in January 1997.[5]

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[5] So that there may be no mistake, the proof of loss, which was paid in full by FEMA, claimed for damages by "FLOOD." The argument here is about the extent of the flood loss. That is to say, the failure to file a claim for the damage now sought within the time required by the policy with the concurring refusal of FEMA to re-open the claim to claim additional damage claimed for storm surge.

The plaintiffs also had an adjuster, C.P. Warren, assess the home for wind damage pursuant to their policy with Lloyds of London.

The plaintiffs then hired a contractor who proceeded to repair the property beginning in December 1996. The repairs continued until September 1997. During the repair process on July 16, 1997, the adjuster from Lloyds of London issued a report explaining that during his examination of the property, he determined that damage to the window frames in the upper floors of the home had occurred as a result of the flood waters twisting and uplifting the home and its decks. Thus, Lloyds of London would not pay the plaintiffs for those losses because its policy only covered wind damage.

After learning of this additional loss, Fickling and Clement contacted FEMA on July 24, 1997 asking it to reopen the plaintiffs' claim. FEMA initially refused to reopen the claim on the basis that the areas the plaintiffs claimed were flood damaged were not covered by their policy. After this response, the plaintiffs and Fickling and Clement repeatedly contacted FEMA in an attempt to have the claim reopened. Finally, on January 21, 1998, FEMA sent a letter to the plaintiffs indicating that it did not believe that the damage the plaintiffs complained of was due to direct physical loss by flood, but advising the plaintiffs that if they wished to pursue the claim, they should secure a report from a structural engineer, at their own expense, stating how the flood waters caused the damage for review by FEMA. Accordingly, the plaintiffs hired Thomas Harwell, a structural engineer, to assess the damage to the home from the hurricane-induced flood. Harwell examined the property on March 3, 1998 and determined that, in his opinion, the flood had indeed caused structural damage to the home.

On May 16, 1988 a representative from FEMA, Marlin Barnett, met with the plaintiffs, Harwell, Warren, and an agent from Fickling and Clement. In a May 28, 1998 letter, Barnett stated his finding that he could not assess any damages to the house because it had already been fixed and that he could not understand how Harwell could confirm any damage due to flooding for the same reason. Therefore, Barnett stated that he could not justify any payments for damages repaired before inspection. On June 18, 1998, FEMA sent the plaintiffs a final letter denying their claim because the repairs to the property had compromised its ability to investigate.

On August 24, 1998, the plaintiffs filed a complaint in the Eastern District of North Carolina claiming that the defendant breached their contract of insurance resulting in damages in excess of $10,000 to the plaintiffs. After filing an answer, the defendant made a motion to dismiss or, in the alternative, for summary judgment based on the fact that the plaintiffs had not filed a proof of loss within the required 60 day period, precluding them from any recovery from the defendant as a matter of law. At no time prior to the commencement of this suit did the defendant assert that the plaintiffs were not entitled to coverage because they failed to file their proof of loss within the 60 day period required under the policy.

The district court granted the defendant's motion on February 1, 1999. The court found without merit the plaintiffs' arguments that the defendant could not use the 60 day period as a defense under the doctrines of waiver and equitable estoppel. The plaintiffs appeal, claiming the district court erred because it should have precluded FEMA from raising the 60 day limitation as a defense under the doctrines of waiver and equitable estoppel, because it was impossible for them to comply with the 60 day requirement, and because the proof of loss requirements in the policy were ambiguous.

II.

We review a decision granting summary judgment *de novo*. *Shaw*, 13 F.3d at 798. A party is entitled to summary judgment only if we find no genuine issues of material fact and we determine that the moving party is entitled to judgment as a matter of law. *Shaw*, 13 F.3d at 798.

III.

The plaintiffs' primary argument is that FEMA could not raise as a defense the plaintiffs' failure to file their proof of loss within 60 days under the doctrines of waiver and equitable estoppel. We are of opinion that both of these arguments are without merit.

A.

It is undisputed that FEMA accepted the plaintiffs' first proof of loss after the 60 day period expired, that Hughes stated that the 60 day requirement would not be enforced, that FEMA continued to address the claim well after the 60 day period expired, and that the Federal Insurance Administrator did not provide an express written waiver of the 60 day requirement. Absent an express written waiver, the plaintiffs relied on FEMA's conduct as set forth above as a waiver of the 60 day requirement. However, the plaintiffs' insurance policy specifically provides in Article 9, Paragraph D that "[n]o action we take under the terms of this policy can constitute a waiver of any of our rights."

The policy did provide two means for FEMA to waive the 60 day requirement: the general waiver provision requiring express written consent of the Federal Insurance Administrator of Article 9, Paragraph D and the specific waiver provision for the 60 day proof of loss requirement in Article 9, Paragraph J(7). However, the

plaintiffs have produced no express written wavier from the Federal Insurance Administrator nor any indication that FEMA exercised its option to waive specifically the 60 day requirement, either through documentation or an adjuster's report. Absent such evidence, we are left with the express terms of the policy, and pursuant to those terms, the above conduct does not constitute either a general wavier or an exercise of FEMA's option to exercise the specific waiver of the 60 day requirement. See *Gowland v. Aetna*, 143 F.3d 951, 954 (5th Cir. 1998); *Phelps v. Federal Emergency Management Agency*, 785 F.2d 13, 19 (1st Cir. 1986); *McCrary v. Federal Emergency Management Agency*, 642 F. Supp. 544, 546 (E.D.N.C. 1986).

B.

The plaintiffs argue that FEMA is equitably estopped from raising the defense that the plaintiffs failed to provide a proof of loss within the requisite time period. The Supreme Court has consistently denied efforts by litigants to estop the government from raising defenses based on claimants' failures to comply with governmental procedures due to misinformation from government agents. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 434 (1990). ("As far as monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds.") (holding that plaintiff who was misinformed about his qualification to collect disability benefits could not estop government from collecting overpayments caused by the erroneous advice of a government employee); *Schweiker v. Hansen*, 450 U.S. 785, 786 (1981) (holding that government agent's advice that misinformed plaintiff that she was not eligible for social security benefits did not rise to level of affirmative misconduct that might reach a serious question as to whether the government might be estopped from insisting on compliance with a valid regulation required to receive

benefits); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947) (finding that farmer could not recover under crop insurance on a lost crop even though the government agency misinformed the farmer that his re-seeded wheat crop was covered by government-provided insurance when, in fact, a statute forbade such coverage). It is true that the Court has left for another day a decision that the government may never be estopped. *Richmond*, 496 U.S. at 423. However, the Court's decisions indicate that estoppel may only be justified, if ever, in the presence of affirmative misconduct by government agents. See *INS v. Hibi*, 414 U.S. 5, 8 (1973) (citing *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961)); *Schweiker*, 450 U.S. at 788-89. Thus, in order to show they even may be entitled to equitably estop FEMA, the plaintiffs must not only satisfy the traditional requirements for equitable estoppel,[6] but also they must show affirmative misconduct by FEMA that exceeds conduct the Court has already deemed acceptable.

The behavior the plaintiffs must rely on in this case to demonstrate affirmative misconduct consists of the following: Hughes representing to the plaintiffs that FEMA was not concerned about the 60 day requirement with major disasters, FEMA accepting the plaintiffs' initial proof of loss well after the 60 day deadline, and FEMA proceeding to continue to address their claim after the 60 day deadline. We agree with the district court that while the plaintiffs may have shown "unprofessional and misleading conduct by

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[6] For purposes of this opinion, we have assumed that the plaintiffs established the four traditional requirements for estoppel as follows: "(1) the party to be estopped knew the true facts; (2) the party to be estopped intended for his conduct to be acted upon or acted in such a way that the party asserting estoppel had a right to believe that it was intended; (3) the party claiming estoppel was ignorant of the true facts; and (4) the misconduct was relied upon to the detriment of the parties seeking estoppel." *McCrary*, 642 F. Supp. at 547 (citing *United States v. 18.16 Acres of Land*, 598 F. Supp. 282, 286 (E.D.N.C. 1984)).

Hughes," this conduct is no worse than that the Supreme Court has determined does not rise to a level to justify estoppel against the government.[7]

IV.

The plaintiffs also argue that due to the devastation and circumstances surrounding Hurricane Fran it was impossible for them to comply with the 60 day proof of loss requirement, and therefore, the district court should not have granted the defendant summary judgment. While we may agree that the circumstances surrounding a major natural disaster may make it extremely difficult for insured parties to comply with the 60 day time limit, we agree with the district court that this argument fails. The insurance policy specifically requires a claimant to file a proof of loss within 60 days to receive coverage regardless of the circumstances of the claim. As explained above, FEMA did not waive this requirement. While compiling the required information in 60 days under stressful circumstances may be difficult, it is exactly what the policy requires.

V.

Finally, the plaintiffs argue that the provisions in their insurance policy regarding the proof of loss requirement are ambiguous and that if we construe the ambiguity in the insured's favor, the defendant is not entitled to summary judgment. The plaintiffs contend that the language of the policy is ambiguous because in addition to the 60 day requirement of Article 9, Paragraph J(3), Article 9 in Paragraph J(1) asks claimants to notify FEMA of the loss in writing "as soon as practicable" and in Paragraph

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[7] We decline to follow the two cases cited by the plaintiffs in which courts have estopped the government from asserting the defense that claimants failed to file a proof of loss in the 60 day period. See *Meister Bros.*, 674 F.2d at 1177; *Dempsey v. Director*, 549 F. Supp. 1334, 1340-41 (E.D. Ark. 1982). We find that the Supreme Court's decisions in this area determine the outcome of this case.

J(2) requests that claimants separate damaged and undamaged property "[a]s soon as reasonably possible." Additionally, plaintiffs' first letter from FEMA, in addition to notifying them that they must file a proof of loss within 60 days, asked the plaintiffs to submit their claim "as soon as possible." We are of opinion that the language in the policy and in the FEMA letter is not ambiguous. While the policy and letter request that claimants act as soon as possible, they also place a 60 day limit on the time claimants have available to make their claims, absent a waiver.

The order of the district court dismissing the case is accordingly

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:98-CV-124-F3

HOWARD G. DAWKINS, JR., M.D., and ANNETTE DAWKINS, *Plaintiffs,*	)	
v.	)	ORDER
JAMES LEE WITT, Director of the Federal Emergency Management Agency, *Defendant.*	)	

[Entered: February 26, 1999]

This matter is before the court on the defendant's Motion for Summary Judgment. In light of the court's allowing the Defendant's Motion for Leave to File Revised Reply Memorandum, the plaintiffs' Motion to Strike Defendant's Reply Memorandum is DENIED.

FACTUAL BACKGROUND

The facts material to the disposition of the pending motion are undisputed. The plaintiffs, Dr. Howard Dawkins, Jr., and Annette Dawkins allegedly suffered damages to their beach home located in the private island community of Figure Eight Island near Wilmington, North Carolina, as a result of Hurricane Fran on or about September 5, 1996. At all pertinent times, the home was insured against flood damage by a Standard Flood Insurance Policy ("SFIP") issued pursuant to the National Flood Insurance program ("NFIP"), and against wind damage by Lloyd's of London. The plaintiffs immediately notified Fickling & Clement, the insurance agency through which plaintiffs had obtained the NFIP flood policy, and the

agency, in turn, notified NFIP. By letter dated September 10, 1996, the Federal Emergency Management Agency ("FEMA")[1] notified the plaintiffs that their claim had been assigned to Bellmon Adjusters, Inc., for investigation. *See* 44 C.F.R. Pt. 61, App. A(1), Art. 9, ¶ J(6) (upon receipt of proper notice of claim, an independent insurance adjuster is retained to investigate the claim). The letter "ask[ed] that you submit your claim as soon as possible," and, referencing Article VIII - - General Conditions and Provisions, Paragraph 1.4, - - "Requirements in Case of Loss" of the plaintiffs' SFIP policy, and Article VII - - General Conditions and Provisions, Paragraph P of the General Policy, the September 10, 1996, letter alerted the plaintiffs that, "Your policy requires you to submit a proof of loss to the Flood Center within sixty days of the loss." *See* Exhibit 3 to defendant's Memorandum in Support of Summary Judgment; 44 C.F.R. Pt. 61, App. A(1), ¶¶ J(3), (6).

On September 13, 1996, Bob Hughes, an independent adjuster employed by Bellmon Adjusters, Inc., met with the plaintiffs at their beach property. According to the plaintiffs (and not disputed by the defendant), Hughes refused to even acknowledge that Hurricane Fran was accompanied by waves, and adamantly refused to inspect any portion of the house above the first level. Hughes was told by the plaintiffs that they only could claim items as losses that had been verified on the proof of loss form. However, Hughes assured them that in major disasters, the sixty-day time period was of no concern to the NFIP, and that if more verifiable flood damage was discovered, the NFIP would reopen the claim. The plaintiffs believed and relied on Hughes's alleged statements.

The plaintiffs did not agree with Hughes's initial "proof of loss" statement because they did not feel the net amount offered was reasonable. Hughes's second proof of

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[1] FEMA administers the NFIP.

loss statement offered a net amount of $6,965.20. The plaintiffs executed this second proof of loss statement on December 12, 1996,[2] and acknowledged the accuracy of the amount under oath. On December 19, 1996, the plaintiffs received and later negotiated a FEMA check in the amount of $6,965.20 for "flood claim payment for building loss" under the NFIP policy.

The wind damage policy adjuster who inspected the property for Lloyd's of London also happened to be a certified flood adjuster. During his examination of the property for wind damage, he made observations leading him to believe that the home had sustained additional flood damage above the ground level by virtue of the action of the storm surge flowing under and around the home, twisting the foundations and causing structural damage which required the replacement of windows. Plaintiffs and their insurance agent repeatedly contacted FEMA in an attempt to have the claim reopened to consider this additional alleged storm surge damage.

In January 1998, F.B. Norman, Claims Examiner and NFIP Servicing Agent, wrote plaintiffs and invited them to retain the services of a structural engineer - - at their own expense - - to prepare and to submit a report substantiating their additional claim if they wished to pursue it. The plaintiffs did so and, in May, 1998, their insurance agent arranged a meeting among himself, Marlin Barnett from NFIP, plaintiffs' structural engineer, and the Lloyd's adjuster who first noticed the alleged storm surge damage. According to affidavits supplied in support of plaintiffs' position, Barnett was very rude and displayed an attitude of disdain in response to the information provided to him at the meeting.

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[2] It is undisputed that this date is beyond the sixty-day deadline for submitting the proof of loss.

In June, 1998, the NFIP again denied the plaintiffs' request to reopen the claim, stating that its right to investigate had been compromised by the plaintiffs having repaired the subject structure. The letter notified the plaintiffs of their right to file suit before August 26, 1998.

Although the plaintiffs did not file their only proof of loss within the required sixty-day period from the date of the loss, the NFIP accepted it and paid the net amount requested. The basis for this lawsuit is NFIP's refusal to re-open the claim to consider the additional flood ~~damages~~ allegedly caused by the storm surge. The plaintiffs never have submitted any supplemental proof of loss for additional sums allegedly due under the policy for flood damage.

Plaintiffs filed this action on August 24, 1998, pursuant to 42 U.S.C. § 4072, alleging that the defendant breached its contract of insurance with them. Not until he filed his Answer on November 9, 1998, did the defendant first raise the affirmative defense that the plaintiffs had not filed their proof of loss in a timely fashion.

ANALYSIS

In support of his Motion for Summary Judgment, the defendant relies primarily on the weight of authority holding that an insured seeking to recover on a claim against an SFIP must comply strictly with the terms, conditions and requirements of the policy. *See, e.g., Heckler v. Community Health Services,* 467 U.S. 51, 63 (1984) ("Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds."); *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 385 (1947) (insurance policies issued pursuant to federal programs must be strictly construed). The proof of loss requirement is an integral part of the SFIP, which is

promulgated through the regulations implementing the NFIP. *See* 42 U.S.C. § 4013; 44 C.F.R. Pt. 61, App. A(1), Art. 9, ¶¶ J(3), (6). The SFIP provides that the insured may not sue on the policy unless all the requirements of the policy have been met. *See id.* at ¶R. The defendant explains that, because the plaintiffs did not meet the requirement that the proof of loss be filed within sixty days of the loss, they have failed to satisfy express conditions precedent to filing this action, as well as to payment on their claim, according to the terms of the SFIP. *See Nabhan v. National Con-Serv, Inc.*, 2 F. Supp. 91 (D. Mass 1998) (allowing summary judgment for defendant which paid pursuant to untimely SFIP proof of loss, but refused to pay additional sums for repairs to pilings of home where no proof of loss ever submitted to support additional amounts).

As sovereign, the United States is immune from suit except as it consents to be sued. *See Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). Absent waiver, sovereign immunity protects the government from suit; in that manner, therefore, sovereign immunity is jurisdictional in nature. *See Federal Deposit Insurance Comm'n v. Meyer*, 510 U.S. 471, 475 (1994); *Wagner v. Federal Emergency Management Agency*, 847 F.2d 515, 518 (9th Cir. 1988) (procedural requirements in the SFIP "constitute conditions precedent to a waiver by the federal government of its sovereign immunity" and "define [a court's] jurisdiction"). Accordingly, the defendant contends this court is without subject matter jurisdiction to hear this action because failure of the condition precedent results in the federal government's non-waiver of its sovereign immunity to allow the suit.

Plaintiffs argue at length the unfairness of holding them to the "impossible" task of assembling, verifying and submitting accurate proof of their entire flood-related loss within sixty days of undergoing a major natural disaster. However, that is precisely what the terms of their flood policy requires.

The plaintiffs further explain that they relied on the representations of Mr. Hughes, who was the insurance adjuster dispatched by the NFIP, and assumed based on their conversations with him that they could supplement their loss claim at some later date. They contend that the defendant should not be allowed to raise the untimeliness of the proof of loss as a defense on the equitable doctrines of estoppel and waiver. This argument has oft been raised and nearly always rejected on facts virtually identical to these.

The doctrine of equitable estoppel is not available against the Government here. Even if this court were to find that the plaintiffs had demonstrated they could present competent evidence of each element of traditional estoppel,[3] in order to fall into the "rather narrow possible range of circumstances" in which estoppel may be had against the Government, the plaintiffs also would have to prove that a government agent engaged in serious "affirmative misconduct." *See Immigration & Naturalization Service v. Hibi*, 414 U.S. 5, 8-9 (1973) (dictum); *Gagliardi*, 952 F. Supp. 163 at 217; *Diamond v. Federal Emergency Management Agency*, 689 F. Supp., 169 (E.D.N.Y. 1988). The court has been unable to

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[3] These elements are: "(1) the party to be estopped knew the true facts; (2) the party to be estopped intended for his conduct to be acted upon or acted in such a way that the party asserting estoppel had a right to believe that it was intended; (3) the party claiming estoppel was ignorant of the true facts; and (4) the misconduct was relied upon to the detriment of the parties seeking estoppel." *McCrary v. Federal Emergency Management Agency*, 642 F. Supp. 544 (E.D.N.C. 1986) (quoting *United States v. 18.16 acres of land*, 598 F. Supp 282, 286 (E.D.N.C. 1984)). The undersigned found in *McCrary* that the plaintiffs could not meet the third element on facts essentially the same as these because the plaintiffs were not ignorant of the true facts; the *McCrary* plaintiffs' insurance policy contained a notice of the sixty-day proof of loss requirement, and they were deemed to have knowledge of the same provision contained in the Code of Federal Regulations. Additionally, in *McCrary*, as here, the NFIP's letter to the plaintiffs and their insurance agent reiterated the sixty-day requirement. *Id.* at 548. *See also Gagliardi v. Omaha Property and Ins. Co.*, 952 F. Supp. 212, 217 (D.N.J. 1997).

locate any defensible reported case[4] in which the NFIP has been estopped to assert a defense to flood insurance coverage based on representations by a government agent, much less by an independent insurance adjuster. In fact, as noted by the Fourth Circuit Court of Appeals,

> The Supreme Court has never explicitly held that the federal government may be equitably estopped ... and it is doubtful that the Court would recognize an estoppel where ... affirmative misconduct by the government was not even alleged ... With one narrow exception not applicable here ..., this court has repeatedly declined to find equitable estoppel against the federal government absent a showing of affirmative misconduct.

Maryland Dept. of Human Resources v. Department of Agriculture, 976 F.2d 1462, 1484, n.24 (4th Cir. 1992) (citations omitted); *see also West Augusta Development Corp. v. Giuffrida*, 717 F.2d 139, 141 (4th Cir. 1983) (government agency is not estopped merely because its actions, if taken by a private party, would have worked an estoppel). In the instant case, although the plaintiffs have alleged unprofessional and misleading conduct by Hughes, they not only have not alleged "serious affirmative misconduct," but also have alleged neither that Hughes was or should be deemed to be an agent of the Government, nor any facts which would support such a legal conclusion. Furthermore, the court is satisfied that an amendment to the pleadings could not cure this deficiency, as the law appears to be settled that estoppel cannot be had against the government on these facts.

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[4] The cases relied upon by the plaintiffs in support of their estoppel argument are not persuasive. For the reasons cogently set forth in the defendant's Reply Memorandum at § II (A)(2)(d), the court declines to follow the rationale of either *Meister Bros., Inc. v. Macy*, 674 F.2d 1174 (7th Cir. 1982), or *Dempsey v. Director, FEMA*, 549 F. Supp. 1334 (E.D. Ark. 1982). *See also Phelps*, 785 F.2d at 17.

Likewise, the plaintiffs' waiver argument must fail. Their SFIP policy reiterates the requirement that the "policy cannot be amended nor can any of its provisions be waived without express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy can constitute a waiver of any of our rights" Exhibit to Complaint, SFIP, Art. 9, ¶ D; *see also Phelps*, 785 F.2d at 19; *Diamond*, 689 F. Supp. at 169; *McCrary*, 642 F. Supp. at 546.

SUMMARY

The result dictated by the applicable law is harsh and its effect on unwary insured property owners is unfortunate indeed. However,

> justification for this refusal [to apply equitable estoppel doctrine against the Government] rests primarily upon considerations of sovereign immunity and constitutional grounds - the potential for interference with the separation of governmental powers between the legislative and executive ... There is also a vital concern for public policy. In a complex government with thousands of agencies and departments, and innumerable employees, there is a very real need to protect the Government against binding commitments by improper conduct of its agents, which might promote fraud or collusion. "Fear of uncontrollable liability and crippling losses to the public treasury have also played a role in sustaining the rule."

Phelps, 785 F. Supp. at 17 (citations omitted); *accord McCreary*, 642 F. Supp. at 548-49. Fifty years ago, the Supreme Court cautioned:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power ... The oft-quoted observation ... that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.

Merrill, 332 U.S. at 34 (citation omitted).

CONCLUSION

For the foregoing reasons, therefore, the defendant's Motion for Summary Judgment is ALLOWED and this action is DISMISSED.

SO ORDERED.

This the 26th day of February, 1999.

/s/James C. Fox
JAMES C. FOX
United States District Judge

FEDERAL EMERGENCY MANAGEMENT AGENCY
FEDERAL INSURANCE ADMINISTRATION

DWELLING POLICY

NATIONAL FLOOD INSURANCE PROGRAM

STANDARD FLOOD INSURANCE POLICY
[Issued Pursuant to the National Flood Insurance Act of 1968, or Any Acts Amendatory Thereof (Hereinafter Called the Act), and Applicable Federal Regulations in Title 44 of the Code of Federal Regulations, Subchapter B]

NOTICE: This policy provides only LIMITED COVERAGE in basements and for the enclosed areas below elevated Post-FIRM building, as set forth below. (See Article 6, Paragraph F.)

SCOPE OF BASEMENT AND ELEVATED BUILDING ENCLOSURE COVERAGE

BUILDING AND CONTENTS ELEMENTS COVERED:

- FOUNDATION ELEMENTS
- REQUIRED UTILITY CONNECTIONS
- SUMP PUMPS
- WELL WATER TANKS AND PUMPS
- OIL TANKS AND THE OIL IN THEM
- CISTERNS AND THE WATER IN THEM
- NATURAL GAS TANKS AND THE GAS IN THEM
- PUMPS AND/OR TANKS USED IN CONJUNCTION WITH SOLAR ENERGY
- FURNACES
- HOT WATER HEATERS
- CLOTHES WASHERS AND DRYERS
- FOOD FREEZERS AND THE FOOD IN THEM
- AIR CONDITIONERS
- HEAT PUMPS
- ELECTRICAL JUNCTION AND CIRCUIT BREAKER BOXES
- CLEAN-UP
- ELEVATORS, DUMBWAITERS, AND EQUIPMENT, EXCEPT FOR SUCH EQUIPMENT LOCATED BELOW THE BASE FLOOD LEVEL, IF SUCH EQUIPMENT WAS INSTALLED ON OR AFTER OCTOBER 1, 1987

ELEMENTS COVERED IN BASEMENTS ONLY:

- UNPAINTED DRYWALLS AND SHEETROCK WALLS, INCLUDING FIBERGLASS INSULATION, AND CEILINGS (REPLACE, AND IN SUBSTITUTION FOR FINISHED WALLS)

ELEMENTS NOT COVERED IN BASEMENTS AND ELEVATED BUILDING ENCLOSURES (SEE NOTE):

- CONTENTS
- IMPROVEMENTS SUCH AS FINISHED WALLS, FLOORS, AND CEILINGS
- BUILDING EQUIPMENT AND FIXTURES NOT SPECIFICALLY COVERED

NOTE: IN THE CASE OF ELEVATED BUILDINGS, COVERAGE LIMITATION APPLIES ONLY TO POSTFIRM ELEVATED BUILDINGS IN SPECIAL HAZARD AREAS DESIGNATED AS ZONES A1-30 (AE), AH AND V1-30 (VE).

* * *

FEDERAL EMERGENCY MANAGEMENT AGENCY
FEDERAL INSURANCE ADMINISTRATION

STANDARD FLOOD INSURANCE POLICY

* * *

ARTICLE 2 – DEFINITIONS

AS USED IN THIS POLICY - -

* * *

"**Flood**" means:

A. A general and temporary condition of partial or complete inundation of normally dry land area from:

1. The overflow of inland or tidal waters.

2. The unusual and rapid accumulation or runoff of surface waters from any source

* * *

ARTICLE 9 – GENERAL CONDITIONS AND PROVISIONS

D. Amendments, Waivers, Assignment: This policy cannot be amended nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy can constitute a waiver of any of our rights. Except in the case of 1. a contents only policy, and 2. a policy issued to cover a building in the course of construction, assignment of this policy, in writing, is allowed upon transfer of title.

* * *

I. Alterations and Repairs: You may, at any time and at your own expense, make alterations, additions and repairs to the insured property, and complete structures in the course of construction.

J. Requirements in Case of Loss: Should a flood loss occur to your insured property, you must:

1. Notify us in writing as soon as practicable;

2. As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that we may examine it; and

3. Within 60 days after the loss, send us a proof of loss, which is your statement as to the amount you are claiming under the policy signed and sworn to by you and furnishing us with the following information:

    a. The date and time of the loss;

    b. A brief explanation of how the loss happened;

    c. Your interest in the property damaged (for example, "owner") and the interest, if any, of others in the damaged property;

    d. The actual cash value or replacement cost, whichever is appropriate, of each damaged item of insured property and the amount of damages sustained;

    e. Names of mortgagees or anyone else having a lien, charge or claim against the insured property;

f. Details as to any other contracts of insurance covering the property, whether valid or not;

g. Details of any changes in ownership, use, occupancy, location or possession of the insured property since the policy was issued;

h. Details as to who occupied any insured building at the time of loss and for what purpose; and

i. The amount you claim is due under this policy to cover the loss, including statements concerning:

(1) The limits of coverage stated in the policy; and

(2) The cost to repair or replace the damaged property (whichever costs less).

4. Cooperate with our adjuster or representative in the investigation of the claim;

5. Document the loss with all bills, receipts, and related documents for the amount being claimed;

6. The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you to complete it. However, this is a matter of courtesy only, and you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it.

In completing the proof of loss, you must use your own judgment concerning the amount of loss and the justification for that amount.

The adjuster is not authorized to approve or disapprove claims or tell you whether your claim will be approved by us.

7. We may, at our option, waive the requirement for the completion and filing of a proof of loss in certain cases, in which event you will be required to sign and, at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages sustained, which is needed by us in order to adjust your claim.

8. Any false statements made in the course of presenting a claim under this policy may be punishable by fine or imprisonment under the applicable Federal Laws.

* * *

IN WITNESS WHEREOF, we have signed this policy below and hereby enter into this Insurance Agreement.

\s\ Elaine C. McReynolds
Elaine C. McReynolds
Administrator
Federal Insurance
Administration

NATIONAL FLOOD INSURANCE PROGRAM
Servicing Agent

9/10/96

RE: POLICY NUMBER: 2031530807
DATE OF LOSS: 9/05/96

HOWARD G & ANNETTE DAWKINS JR
307 ORTON DR
GREENVILLE, NC 27858-3734

INS & CONSULTING OF GREENVILLE
DBA FICKLING & CLEMENT INS
PO BOX 1626
GREENVILLE, NC 27834

Dear Policyholder:

We received your notice of claim for:
219 BEACH RDN
WILMINGTON, NC 28405

Your loss has been assigned to:
BELLMON ADJUSTERS, INC.

If you do not find a local telephone listing for this adjuster, contact your agent or the Flood Insurance Processing Center.

An adjuster from this firm will investigate your loss to determine if it is covered by your policy, and may help you present your claim. We ask that you submit your claim as soon as possible. Your policy requires you to submit a proof

of loss to the Flood Center within sixty (60) days of the loss. Please refer to Article VIII-General Conditions and Provisions, Paragraph I.4- "Requirements in Case of Loss" of the dwelling policy or Article VII- General Conditions and Provisions, Paragraph P - of the General Property Policy. Your adjuster can provide this form to you and help you complete it.

Please do not discard any damaged property prior to the adjuster's inspection unless it poses a health or safety hazard. It is especially important that you do not dispose of the major contents items, before the adjuster's first visit.

Our records show the following mortgagee(s) on your property:

WACHOVIA BK & TRUST CO NA

If eligible, the check we issue for your building claim will be payable to you and to the above. If this information is incorrect, please provide the adjuster with the correct information. You may be requested to furnish supporting documents in this regard.

If you have not heard from the adjuster, or have any other problem or questions regarding your claim, please call us at the above number.

Sincerely,

Flood Insurance Processing Center-Claims Department

PROOF
OF
LOSS

FICKLING & CLEMENT
INSURANCE
P.O. BOX 1626
GREENVILLE, NC 27835

POLICY NO. FL2-0315-3080-7

12/25/95 TO 12/25/96
POLICY TERM

250000.00
AMT OF BLDG COV AT TIME OF LOSS

100000.00
AMT OF CNTS COV AT TIME OF LOSS

TO THE NFIP OF ___At the time of loss, by the above indicated policy of insurance, you insured the interest of

HOWARD DAWKINS, JR
219 BEACH RD, FIG 8 ISLD, WILMINGTON, NC 28405

against loss by FLOOD to the property described according to the terms and conditions of said policy and of all forms, endorsements, transfers and assignments thereto.

TIME AND ORIGIN

A FLOOD loss occurred about the hour of __ o'clock ____ on the 5 day of 9 1996, the cause of said loss was: FLOOD

OCCUPANCY

The premises described, or containing the property described, was occupied at the time of the loss as follows, and for no other purpose whatever: DWELLING/SEASONAL

INTEREST:

No other person or persons had any interest therein or incumbrance thereon, except: WACHOVIA BANK

CHANGES:

Since the said policy was issued, there has been no changes in the property described, except: NONE KNOWN

- FULL AMOUNT OF INSURANCE applicable to the property for which claim is presented is $350000.00
- ACTUAL CASH VALUE of building structures $273636.34
- ADD ACTUAL CASH VALUE OF CONTENTS or personal property insured.....$102000.00
- ACTUAL CASH VALUE OF ALL PROPERTY $375636.34
- FULL COST OF REPAIR OR REPLACEMENT (Building and Content).....$9172.57
- LESS APPLICABLE DEPRECIATION $1384.92
- ACTUAL CASH VALUE LOSS is $7787.65

- LESS DEDUCTIBLES Bldg Deductible & amt of contents less than deductible $822.45
- NET AMOUNT CLAIMED under above numbered policy is $6965.20

The said loss did not originate by any act, design or procurement on the part of your insured, nothing has been done by or with the privity or consent of your insured to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss no property saved has in any manner been concealed, and no attempt to deceive the said insurer as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

Subrogation - To the extent of the payment made or advanced under this policy; the insured hereby assigns, transfers and sets over to the insurer all rights, claims or interest that he has against any person, firm or corporation liable for the loss or damage to the property for which payment is made or advanced. He also hereby authorizes the insurer to sue any such third party in his name.

The insured hereby warrants that no release has been given or will be given or settlement or compromise made or agreed upon with any third party who may be liable in damages to the insured with respect to the claim being made herein.

The furnishing of this blank or the preparation of proofs by a representative of the above insurer is not a waiver of any of its rights.

State of North Carolina
County of Pitt

\s\ Howard Garrett Dawkins, Jr.
\s\ Alice Annette Williams Dawkins
Insured

Subscribed and sworn to before me this 12th day of December, 1996.

Adjuster: BOB HUGHES

\s\ _____
Notary Public Adjuster

My Comm. Expires 11-29-99 Greenville, NC

THIS CHECK COVERS ITEMS INDICATED BELOW
NATIONAL FLOOD INSURANCE PROGRAM

CHECK NO. FL 029494
DATE PAID 01/14/97 FL 029494
POLICY NUMBER 2031530807
DATE OF LOSS 9/05/96
CLAIM NUMBER 2031530807960905

REFERENCE	TYPE OF PAYMENT	AMOUNT
2031530807	FLOOD CLAIM PAYMENT FOR BUILDING LOSS	$6,965.20

ICO# 592 AMOUNT PAID $6,965.20

1ST MORTGAGE LOAN NUMBER 216430004048572

INSURED'S NAME
HOWARD G & ANNETTE DAWKINS JR
PROPERTY ADDRESS
219 BEACH RDN
WILMINGTON, NC 28405

PAYEE
HOWARD G & ANNETTE DAWKINS, JR
307 ORTON DR
GREENVILLE, NC 27858-3734

FEDERAL EMERGENCY
MANAGEMENT AGENCY
NATIONAL FLOOD
INSURANCE PROGRAM
ROCKVILLE, MD 20649-6468

CHECK NO: FL029494

DATE	AMOUNT
01/14/97	$6,965.20

SIX THOUSAND NINE HUNDRED SIXTY FIVE AND 20/100 Dollars

Pay
TO THE ORDER OF
HOWARD G & ANNETTE DAWKINS, JR
307 ORTON DRIVE
GREENVILLE NC 27858-3437

AND

WACHOVIA BK & TRUST CO, NA
&/OR THEIR ASSIGNS ATIMA
PO BOX 1767
GREENVILLE, NC 27835-176

VOID AFTER 180 DAYS

Ref FLOOD CLAIM NO. 2031530807960905

HIGHLAND COMMUNITY BANK
CHICAGO, IL 60620

C.P. Warren Adjusters, LLC
P.O. Box 150
Point Harbor, NC 27964
Phone/Fax (919) 491-2332

Howard Dawkins, Jr. *7/16/97*
307 Orion Drive
Greenville, NC 27834

Policy # 2388/95
Claim #: 3655
Date of Loss: 9/6/96

Dear Dr. Dawkins:

We have received a request from your agent, Fickling and Clement Insurance, to respond to your fax to them dated 5/29/97. In your fax, you state the damage to your cottage was in excess of $150,000.00, but the estimate submitted by our Adjuster Ken Bitner was approximately half that amount. A complete review of the damages to your cottage from both the Bertha and Fran storms indicates there were damages from both wind and flood. Mr. Bitner's estimate was for wind damage as a result of Hurricane Fran only. I have taken your list and addressed each item, 31 through 45, with regard to wind or flood.

Item 31 – Roof Wind damage
Amount requested by Insured - $5700.00
$5700.00 plus 20% O&P for a total of $6840. submitted by Adjuster Ken Bitner in Fran Estimate.

Item 32 – Sewage System – Flood Damage
Amount requested by Insured - $2350.00.
No coverage.

Item 33 – Garage Door – Flood Damage
Amount requested by Insured - $536.00.
Not covered by wind policy.

Item 34 – Dumbwaiter – Flood Damage
Amount requested by Insured - $3483.00.
Not covered by wind policy.

Item 35 – Heat & A/C – Flood Damage
Amount requested by Insured - $6035.00.
Not covered by wind policy.

Item 36 – Invisible Fence – Flood Damage
Amount requested by Insured - $600.00.
No coverage.

Item 37 – Temporary Roof Repairs – Wind Damage
Amount requested by Insured - $75.00.
Amount submitted by GAB Adjuster/Bertha claim - $720.00

Item 38 – Electrical Panel – Flood Damage
Amount requested by Insured - $1250.00.
Not covered by wind policy.

Item 39 – Yard Cleanup/Landscape – Flood Damage
Amount requested by Insured - $3495.00.
No coverage.

Item 40 - Chimney Cap Repair - Wind Damage
Amount requested by Insured - $997.00
Amount submitted by GAB Adjuster/Bertha claim $594.00
Amount submitted by Adjuster Ken Bitner/Fran claim - $594.00.

Item 41 - Windows and Doors - See Contractor's Estimate that follows.

Item 42 - Sheetrock Walls - Wind damage 2nd Floor only, Flood 1st Floor
See Contractor's Estimate that follows.

Item 43 - Interior Repairs - See Contractor's Estimate that follows.

Item 44 - Attic Insulation - Wind Damage
Not included on any estimate.

Item 45 - Gas Logs - Not included on any estimate.

With regard to your Contractor's estimate which is not itemized and is not separated as to wind or flood, I note the following:

Item 1 - Tear out and debris removal - Amount requested by Insured - $8500 - $10,000.
Included flood damage and removal not covered by your wind policy. $1550.00. submitted by Adjuster Ken Bitner/Fran wind claim.

Item 2 - Repair of the roof, chimney and attic fan - Wind damage
Amount requested by Insured - $6825.00
Amount submitted by Adjuster Ken Bitner/Fran claim $6394.94. Amount submitted by GAB Adjuster/Bertha claim. $600.00

Item 3 - Wallboard and Paint - Requested by Insured $1800-$2500.
Amount submitted by Adjuster Ken Bitner/Fran Claim $5711.78 plus 20% O&P for total of 6854.13.

Item 4 - Rugs and Floors - Amount requested by Insured - $3202.50
Amount submitted by GAB Adjuster/Bertha claim $6251.20 for floors
Amount submitted by Adjuster Ken Bitner/Fran claim $2657.79 for floors. This appears to be for damages already paid under the Bertha claim.
Amount submitted by Adjuster Ken Bitner/Fran claim for carpet $5324.28
Total for rugs and floors $14,397.27.

Item 5 - Kitchen Cabinets
Amount requested by Insured - $8038.40.

I inspected this loss with you in September of 1996 and there was no evidence of damage to kitchen cabinets. Ken Bitner and Larry Smith re-inspected this loss in December of 1996 with you and your contractor and found no damage to the kitchen cabinets.

Item 6 - Windows and Doors - Amount requested by Insured - $21,594.20

This total contains flood damage to doors. When I inspected this loss with you in September of 1996, I advised there was no coverage to windows unless there was direct damage to the windows from wind. Ken Bitner advises he again discussed with you in December of 1996, the lack of coverage for windows unless physically damaged by wind. Any bending or twisting of windows or door frames as a result of the cottage being uplifted or twisted from flood waters under the cottage would be considered flood damage and therefore not covered by your wind policy.

Item 7 - Decks
Amount requested by Insured - $43,575.00

You have indicated the decks were uplifted and no longer drained away from the cottage. This again is a result of flood waters washed through the first floor level of your cottage and moved the pilings of the decks.

Item 8 - Electrical Repair - Amount requested by Insured - $800.00
Amount submitted by Adjuster Ken Bitner/Fran claim - $583.20
Amount submitted by the Flood Adjuster/Fran $1250.00

After your letter of 11/18/96, I requested Adjusters Ken Bitner and Larry Smith meet with you and your contractor for a thorough re-inspection of all damages. Mr. Bitner states during the inspection he advised that much of your damages were flood (ie; dumbwaiter, sewage system, etc.) and therefore not covered by the wind policy. As I recall, this was also discussed at our initial meeting in September of 1996.

In conclusion, it is our opinion that wind did not bend the window and door frames, nor uplift the decks on the cottage. The wind did not cause damage to the cottage that would require replacement of all windows and doors, all siding and all decks on the cottage. It appears that the additional monies you seek are flood related and we feel our estimate for repairs as a result of wind from Hurricane Fran is more than fair.

Respectfully,
/s/ C.P. Warren
C.P. Warren, Adjuster

CC: Beam, Cooper Gainey/NXS/Elois Weinhold
Fickling & Clement Insurance
Kenneth Bitner, Adjuster

July 24, 1997

****
****

Agency:
Fickling & Clement Insurance
P. O. Box 1626
Greenville, NC 27835

Insurance Company:
National Flood
ATTN: FREDA COPELAND
CLAIMS

Insured:
Howard Dawkins, Jr.
Annette Dawkins
307 Orton Drive
Greenville, NC 27834

Policy Number: 2031530807
Policy Term: From: 12/25/95 To: 12/25/96
Policy Desc: FLOOD- BEACH HOUSE

DATE OF LOSS: 9-5-96

PLEASE FIND COPY OF A LETTER FROM C.P. WARREN ADJUSTERS REGARDING WIND DAMAGE TO INSURED'S BEACH HOME.

A CLAIM FOR FLOOD DAMAGE WAS SUBMITTED TO NATIONAL FLOOD BACK IN SEPTEMBER, 1996. THE FLOOD COMPANY PAID $6965 FOR DAMAGE BY FLOOD. IN READING MR. WARREN'S LETTER, YOU WILL SEE ADDITIONAL FLOOD DAMAGE

DISCOVERED BY MR. WARREN. THE DAMAGE IS TO THE WINDOWS AND DECKS DUE TO THE HOUSE BEING UPLIFTED AND/OR TWISTED FROM FLOOD WATERS UNDER THE HOUSE.

WE ARE REQUESTING THE FLOOD CLAIM BEING RE-OPENED AND REVIEWED. MR. WARREN ADVISED HE IS A CERTIFIED FLOOD ADJUSTER. FEEL FREE TO GIVE HIM A CALL TO DISCUSS THE ADDITIONAL FLOOD DAMAGE DISCOVERED.

IF YOU HAVE ANY QUESTIONS OR IF WE CAN BE OF ANY ASSISTANCE, PLEASE DO NOT HESITATE TO GIVE US A CALL.

SINCERELY,

/s/ Rhonda J. Edwards
RHONDA J. EDWARDS
CUSTOMER SERVICE AGENT

NATIONAL FLOOD INSURANCE PROGRAM
Servicing Agent

August 26, 1997

Howard & Annette Dawkins Jr
307 Orton Dr
Greenville, NC 27858-3734

RE: Policy Number: 2031530807
Date Of Loss: 9/5/96

Dear Policyholder:

We are in receipt of your agent's correspondence regarding the above captioned claim.

Please be advised that the Standard Flood Insurance Policy does not cover any finished items or contents in the enclosures lower than the elevated floors of an elevated building. Therefore your request for consideration of the windows and finishes would not be covered as there should be no walls, enclosures, etc. in that lower level. Also note that the flood policy does not cover decks, walks, patios, etc or anything else located outside the perimeter walls of the building. The above exclusions can be found in Article 6 of the policy.

Therefore the original claim was handled accordingly and the file remains closed with no further action warranted.

For any items we have denied, you have one year from the date of this denial to file suit in the US District Court for the district in which the insured property was located at the time of the loss.

Waiving none, but reserving all rights and defenses under the policy, we remain,

Sincerely,

/s/ F.M. Copeland
F.M. Copeland
Technical Support Specialist
NFIP Servicing Agent

/s/ K.L. Christian, AIC
K.L. Christian, AIC
Claims Supervisor
NFIP Servicing Agent

cc: Fickling & Clement Insurance
PO Box 1626
Greenville, NC 27835

FICKLING
& CLEMENT
INSURANCE

January 8, 1998

F.M. Copeland
National Flood Insurance Program
PO Box 6468
Rockville, MD 20849-6468

RE: Howard Dawkins
203 15308097 - date of loss – 9-5-96

Dear Ms. Copeland:

I am in receipt of your letter once [a]gain denying coverage for the lower enclosed areas.

Once again, I want to advise you that we are not disagreeing with the denial of coverage in the lower enclosed areas where no coverage exists. The reopening of this claim was ***solely for you to review the damage to the windows caused by the twisting of the house.***

On July 24, 1997, we wrote to you asking you to review the claim due to additional flood damage discovered by the contractor and C. P. Warren, the wind adjuster.

I specifically told you the additional damages we were referring to is damage to the windows and decks being uplifted by flood water causing the house to twist. I understand that the decks are not covered.

On August 26, 1997, we received a letter from you stating that the policy does not cover finished items or contents in enclosures lower than the first finished elevated floor.

After many attempts to reach you by phone, we did finally talk in early October, 1997. I explained to you then that we are not asking for payment to any areas other than the windows that were damaged. The window panes were not broken. The windows were leaking rainwater all round the casings where they were no longer properly seated in their proper place. All the windows - ***not the window panes - not the glass - but the whole window*** - had to be replaced. ***Not the windows on the lower level,*** but the windows on the first finished elevated floor and the 2nd floor had to be replaced. According to the contractor and wind adjuster, C.P. Warren, the damage was caused by water and wave action causing the house to twist/move and thereby causing the windows to shift/ pop loose/ break their seal/ come unseated - whatever terminology you would like to use.

There **was** damage to these windows during this storm. They were leaking all around the casings - not from flood water - from rainwater. However, according to Mr. Warren, the reason they were leaking rainwater was due to the flood waters causing the house to twist/move as stated before.

In your letter to us dated December 19, 1997, you also mention the bike and plants on the decks. These items were not left on the deck during the hurricane. These items were placed on the deck after the storm. Surely you do not believe these items would still be on the deck after the 130+ mph winds swept through this area.

I do not know what Dr. Dawkins is to do. There is no question that there was damage to the windows from this storm. The wind adjuster says it was due to the flood not the wind. The Flood Insurance Program will not even acknowledge there was a problem. I have advised Dr. Dawkins that he has until 8-26-98 to file suit in US District Court and have given him a copy of your letters to this agency along with a copy of our letters and documentation of the phone conversations.

Feel free to contact me if you have any questions regarding the damage or if you are unsure of exactly what we are asking you to review. Please keep in mind that **this does not have anything at all to do with the enclosed area below the first finished floor.**

Sincerely,

Sherry B. Edwards, AAI CPIW CISR
Senior Vice President

cc: K.L. Christian, AIC
Claims Supervisor

Dr. Howard Dawkins
307 Orton Drive
Greenville, NC 27834

Troy Smith, (Attorney at Law)
[Ward & Smith]
PO Box 8088
Greenville, NC 27834

C. P. Warren, Adjuster
PO Box 150
Point Harbor, NC 27964

W. Kurt Fickling, President
Fickling & Clement Insurance

NATIONAL FLOOD INSURANCE PROGRAM
Servicing Agent

1/21/98

HOWARD G & ANNETTE DAWKINS JR
307 ORTON DR
GREENVILLE, NC 27858-3734

Policy: 2031530807
D/Loss: 9/5/96

Dear Policyholder:

We received a letter from your agent explaining your dilemma. The wind adjuster says the damage to the window casing was due to the flood not the wind and the Flood Insurance Program will not acknowledge there was a problem.

Although, the wind adjuster says any bending or twisting of windows or door frames as a result of the cottage being lifted or twisted from flood waters under the cottage would be considered flood damage, the flood adjuster is not in agreement that the cottage was uplifted by the flood waters. The only significant damage noted were those to the lower level enclosure, which cannot be covered by the flood policy. We only insure you against all direct physical loss by or from flood to the insured property. The flood waters did not reach the windows and doors in question.

However, if you wish to pursue your claim for damage to the window casings being the direct result of the flood you may at your own expense secure the service of a structural engineer and submit the report for our review. The report should state how the action of the flood waters caused the damage and exactly when this occurred.

Waiving none, but reserving all rights and defenses under the policy, we remain,

Sincerely,

/s/ F.B. Norman
F.B. Norman
Claims Examiner
NFIP Servicing Agent

/s/ K. Christian, AIC
K. Christian, AIC
Claims Supervisor
NFIP Servicing Agent

cc: Fickling & Clement Ins.

CAROLINA BENCHMARK

CAROLINA BENCHMARK
INCORPORATED

April 8, 1998

Dr. Howard G. Dawkins, Jr.
2577 Stantonsburg Road
Greenville, North Carolina 27858

SubJ; Inspection of House at 219 Beach Road, Figure Eight Island

On Saturday March 3, 1998, I went with you to the subject site and viewed the house and the island. Previously I had inspected facilities on North Topsail Island within three days after both Hurricanes Bertha (July 12, 1996) and Fran (September 5, 1996). North Topsail Island is approximately 22 miles Northeast of Figure Eight Island. I personally observed the devastation of both Hurricanes and in particular, Hurricane Fran on September 7, 1996 and the effect of the high water and surge damage.

The structure is a three story wood frame residence, however, the first floor is constructed, as observed, for garage and storage as allowed. Dr. Dawkins' house is orientated Due North and South with the front of the house facing due South. Houses on each side of this house face Southeast. The lot to seaward (looking directly due south from the front of Dr. Dawkins' house) of Dr. Dawkins' is vacant. This vacancy allowed storm waters to come directly towards his house with no effective impediment. To the North west and North of Dr. Dawkins' house is marsh and sound with no impediment to high water and surge. I observed, in a picture of a wall, water marks made by the surge. It is clear to me that water surrounded the house on

all sides up to about the five foot level and above the floor slab. This water was being pushed in a southerly direction by the hurricane. When the back surge occurred the water they came from a northerly direction flowing out of the sound towards the Atlantic Ocean as the Hurricane passed.

Observations of the structure indicate to me and it is my professional opinion that this wood frame structure had been twisted by the water surge, and had experienced structural damage therefrom. From my experience at North Topsail Island in observing Hurricane Fran damage first hand and my views of the photographs taken on Figure Eight Island shortly after Hurricane Fran, severe damage was done to the subject structure by the hurricane storm surge and high water. I observed probable upwelling of the concrete slab in the garage as evidenced by cracks in the concrete. Cracks in the structure ceiling remain and were observed on March 3, 1998.

/s/ THOMAS W. HARWELL, PE
THOMAS W. HARWELL, PE

CAROLINA BENCHMARK • 102 OAKMONT DRIVE
GREENVILLE, N.C. 27858 • TELEPHONE (919) 758-8440

FICKLING
& CLEMENT
INSURANCE

May 20, 1998

Marlin W. Barnett, Senior General Adjuster
National Flood Insurance Program
10115 Senate Drive
Lanham, Maryland 20706

Dear Mr. Barnett:

RE: Dr. Howard Dawkins

Enclosed is a copy of the original flood estimate that you requested from Mr. Fickling. Please note that this was during the very early stages of the repairs. In July 1997, the insured became aware that there was additional flood damage to this house. In a letter from C.P. Warren, whereby he was denying wind coverage, he indicated that much of the damage to his house was caused by the flood. As soon as we became aware of this, On July 24, 1997, we sent a letter to Freda Copeland at NFIP requesting that this claim be reopened and the damage inspected. On September 2, 1997 we received a cc of a letter to Dr. Dawkins from NFIP dated August 26, 1997, refusing to reopen the claim and advising the insured he has one year from this date to file suite in the US District Court. On or about September 5, 1997, I called NFIP to advise them to re-read the claim that was submitted and asked them once again to at least contact CP Warren to discuss. I expected a call back from the claims supervisor. On or about 10-9-97, I talked w/Freda Copeland at NFIP and she requested a statement from the contractor and itemized bills. These were sent to her on 12-4-97. The

itemized bills also included actual invoices for the purchases made. This is a very large package of information. You should be able to obtain this from NFIP.

On December 30, 1997, we received another letter from NFIP, Freda Copeland, dated 12-18-97, once again denying the claim and once again telling us the insured has until 8-26-98 to file suit. On January 8, 1998, I once again responded to NFIP asking them to reopen the claim. On January 30, 1998, we received another denial letter from NFIP but this time, they required that Dr. Dawkins, at his own expense, secure the service of a structural engineer and submit the report for their review. This was done and the report was sent registered/certified mail on April 21, 1998. Thus the reason for your recent involvement in this loss.

Feel free to contact me with any questions you have.

Sincerely,

Sherry B. Edwards, AAI CPIW CISR

cc: Dan Martin
Ward & Smith, Attorneys
127 Racine Drive
Wilmington, NC 28403

Dr. Howard Dawkins
307 Orton Drive
Greenville, NC 27834

NATIONAL FLOOD INSURANCE PROGRAM
Bureau and Statistical Agent

May 28, 1998

National Con-Serv Inc.
451 Hungerford Drive
Suite #408
Rockville, Md. 20850

Att: Ms. Lynn Welch
Claims Manager

Re: Insured: Howard Dawkins
Policy: 2-0315-3080-7
D/L: September 5, 1996

Dear Lynn:

We received this file from your office requesting a reinspection of the above captioned claim. There is a discrepancy of additional damages between your office and the Insured and the Insurance Agent Fickling & Clement. We contacted both the Insured and the Agent and made an appointment to inspect this claim on Saturday, May 16, 1998.

Historical Data:

The insured building is a two story post firm elevated building with partial enclosure below the lowest elevated floor and was built in 1989. This building is a wood structure with a composition roof located at 219 Beach Road

North (Figure Eight Island) Wilmington, North Carolina 28405. The building is located in a A-11 flood zone. The construction of this building is of good construction. The buildings in the area of the insured building are of above average. The entrance to this area (Figure Eight Island) is through a security gate and bridge to the Island. This building is a seasonal building owned by the Insured whose permanent residence shows to be at 302 Orton Drive in Greenville, North Carolina 27858.

The flood policy shows the policy number of 2-0315-3080-7, with the policy period being from December 25, 1995 to December 25, 1996. The policy insures the building in the amount of $250,000.00 and $100,000.00 on the contents (limits of coverage on both building and contents). There is a $500.00 deductible for both building and contents separately. There is a Mortgagee in the favor of Wachovia Bank and Trust.

The Insured building has coverage for other perils under a policy from Lloyd's of London under certificate number 23 88-95 that insures the building for $300,000.00 and contents in the amount of $65,000.00 and there is a 1% deductible. There is also flood coverage, however this coverage begins when the regular flood policy is exhausted.

On September 5, 1996 a Hurricane (Fran) hit the area near Wilmington, North Carolina area with wind speeds of around 115 mph, but was slowly diminishing due to effects of the proximity of the storm to the mainland and several other climatological factors according to several weather experts. The experts also stated that at the time the Hurricane hit this area it coincided with a low astronomic tide levels, and may have prevented the coastal areas from experiencing another two to four feet of seawater elevation. This storm caused considerable damage from South Carolina, North Carolina, Virginia and Maryland.

The insured building received both flood and wind damage. The insured reported both damages to his agent, who reported claims to the proper companies. The flood claim was assigned to Bellmon Adjusters and the wind claim was assigned to C.P. Warren Adjusters, LTD. The original flood adjuster inspected the flood loss with the Insured and found that there was a water line on the enclosed lower level on both the garage and siding of about 64 inches on the exterior and 59 inches of flooding on the interior. The adjuster states that the Insured was informed of the restricted coverage of the enclosure beneath the lowest elevated floor. The adjuster proceeded with the completion of the damage estimate of $8,676.50 less depreciation of $1,211.30 for an actual cash value of $7,465.20 less the deductible of $500.00 for a net payment of $6,965.20. The loss to the contents was less than the deductible. The adjuster submitted proof of Loss to the Insured and apparently was agreed by signing the proof and returning it to the adjuster. The proof of loss was then sent to your office and payment was issued and sent to the Insured. The wind adjuster states that the wind damage to the insured building they have made payment to the insured in the amount of $20,506.96.

Summary:

We met with the Insured, Agent (Kurt Fickling), Thomas Harwell, (Engineer), and C.P. Warren (wind adjuster) on Saturday, May 16, 1998 at the insured building. The Insured and agent both state that they have requested additional payment for flood damage from your office. The Insured states that he obtained the services of a Contractor Nick Garrett, Inc. and that all repairs to the insured building has been completed. The Insured and Agent both state that all of the windows, exterior siding, interior sheetrock, insulation, and exterior doors have been replaced. The insured has replaced all of the decks, and landscaping. We advised both parties that the decks and landscaping was not covered by the policy.

We also advised the Insured and Agent that since your company did not have the opportunity to inspect damage before repairs are made, that it has been our experience that these would not be paid, however this request would have to be answered by your company. The Insured also states that during the repairs, that they made several changes, such as replacing windows with double-hung windows, replacing the cabinets in the kitchen and dining area. They also changed the lower enclosure by finishing this space and changing the stairway to the upper floor (lowest elevated Floor). The Insured also obtained the services of an Engineer Carolina Benchmark (Thomas Harwell) who inspected this building after all repairs have been made and states that the wood frame structure had been twisted by the water surge and had experienced structural damage.

We inspected this insured building and feel that we can not determine the amount of damage nor the extent of needed repairs for these damages, without actually inspecting the damages. We do not understand how the Engineer can state that the building was twisted on the foundation since his inspection was after the repairs were made and obviously did not inspect building after the storm. The Insured has stated that he has spent about $400, 000.00 for repairs to the insured building. We feel that most of this money was for changes. The attached photos show changes to the exterior such as siding, windows decks and the lower enclosure area and these changes would be rather significant part of the Insured's expenditures. The Insured has supplied a copy of a video that he made when they first arrived at the insured building after the storm. The Insured states on the video, that there was damage to the front Doors (double doors) because the were opened when they arrived. We can not tell if they were damaged by flood or wind. We also have discussed claim with the wind adjuster and he states that they have paid the Insured for damages from what they believe was from wind and they believe that the siding,

decks windows and doors should be paid by the flood policy. Since all repairs have been made, we can not justify any repairs for damages that were repaired before damage was inspected.

Conclusion:

We are with this report submitting our findings for your decision. We suggest that you submit your letter to the Insured along with your decision.

Since there is nothing further for our office to do, in connection with this matter, we are retiring our file with this report.

Sincerely,

/s/ Marlin Barnett
Marlin Barnett
Senior General Adjuster
NFIP Bureau and Statistical Agent

Cc: Ms. Greta Richardson

Encl; Photos
Video

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
EASTERN DIVISION

CIVIL ACTION FILE NO.: 4:98-CV-124 F(3)

HOWARD G. DAWKINS, JR.,
M.D. and ANNETTE DAWKINS,
Plaintiffs

v.

JAMES LEE WITT, DIRECTOR
OF THE FEDERAL EMERGENCY
MANAGEMENT AGENCY,
Defendant.

AFFIDAVIT OF W. KURT FICKLING

I, W. Kurt Fickling, being first duly sworn, deposes and says:

1. I am the Chief Executive Officer of Fickling & Clement Insurance, located in Greenville, North Carolina.

2. I have been in the property/casualty insurance business for over 28 years. I have been an Independent Insurance Agent since 1975 and an instructor for numerous insurance institutes, training programs, and university classes.

3. I currently serve on the North Carolina Insurance Commissioners' insurance advisory board and have qualified on numerous occasions as an expert witness for insurance lawsuits, testifying regarding coverage terms. I have sat on insurance industry boards and commissions and helped to author policy language currently in use today in the property/casualty insurance business.

4. As the Chief Executive Officer for Fickling & Clement, my job requires that I put into place different procedures for the company regarding handling of claims and claim reporting.

5. In 1996, Dr. Dawkins purchased two policies of insurance on his Beach Front North home on Figure Eight Island through my company, one with the National Flood Insurance Program ("NFIP") and the other with Lloyd's of London.

6. After Hurricane Fran occurred in September of 1996, Dr. Dawkins immediately notified us that this property had been damaged. Our office in turn, immediately contacted the NFIP to notify them of this damage.

7. While members of my staff have been involved with Dr. Dawkins' NFIP claim from the beginning, my personal involvement in the matter involving this claim came when it was first discovered in July of 1997 that the majority of the damage to Dr. Dawkins' property was caused by flood rather than

wind as initially thought. This discovery was made by C.P. Warren, the adjuster for Lloyd's of London, who is also a certified flood adjuster.

8. Sherry Edwards, a Senior Vice President with our company, reported the previously undiscovered flood damage immediately to the NFIP and was informed that coverage was being denied because the terms of the policy did not provide coverage below the first floor. Significantly, however, there was never a request by Dr. Dawkins for reimbursement of damage below the first floor.

9. After several unsuccessful attempts to make the NFIP claims department understand that the damage claimed was not below the first floor, Dr. Dawkins provided us with a very detailed description of the loss, the necessary repairs, and photographs of the same.

10. Sherry Edwards made copies of all of these materials and mailed them to the NFIP.

11. After reviewing these materials, the NFIP requested that Dr. Dawkins hire a structural engineer, at his own expense to demonstrate that there was flood damage.

12. At no time, however, did the NFIP raise the issue of filing a proof of loss.

13. After discussing the request with Dr. Dawkins, he hired Thomas Harwell, a structural engineer, to assess the cause of the damage to his property.

14. After inspecting the property, Harwell prepared a report in which he concluded that the damage to the property was indeed caused by the flood waters during Hurricane Fran.

15. I then instructed Sherry Edwards to send a copy of the report to the NFIP which she did. At the same time, I contacted Warren, and asked if he would meet with the NFIP adjuster, Dr. Dawkins, Harwell, and myself on Figure Eight Island. Mr. Warren agreed to do so.

16. Sherry Edwards then called for the NFIP adjuster, Marlin Barnett, to meet all of us on Saturday May 16, 1998 at Dr. Dawkins' home on Figure Eight Island.

17. Barnett agreed to make the trip to Figure Eight Island to inspect the property and at no time during this meeting was the issue of the proof of loss raised.

18. To my surprise, at numerous times during the meeting, Barnett stated that he did not have an opportunity to view the damage because Dr. Dawkins had already made the necessary repairs. To the contrary, however, Barnett and anyone else with the NFIP for that matter were given more than ample opportunity to come and inspect the damage. They chose not to do so however until May of 1998.

19. Furthermore, although the property had been repaired, Dr. Dawkins was very diligent in documenting the extent and the cost of the

repairs that had to be made as a result of the hurricane. He had also hired a structural engineer to prepare a detailed report regarding the same. All of this information was provided to the NFIP prior to the date of the meeting.

20. Throughout all of my years in the insurance industry, I have never seen an adjuster display such an attitude of disdain as Barnett did during this meeting. On several occasions, he even asked us how was he supposed to know that there had been a flood there because he had not seen the flood.

21. This is undoubtedly the most asinine statement that I have ever heard an adjuster make in any scenario I have seen and it is also one of the most disturbing cases of bad faith adjusting that I have seen.

22. I am not aware of any mention of the filing of a proof of loss during the approximate two years that the NFIP continued to string Dr. Dawkins along and required him to incur added expenses in pursuing his claim when he had already suffered such a great loss during Hurricane Fran.

This the 22 day of January, 1999.

\s\ W. Kurt Fickling
W. Kurt Fickling

Sworn to and subscribed before me,
This 22nd day of January, 1999.
Notary Public
My Commission Expires: March 4, 2002